SUPREME COURT OF THE UNITED STATES

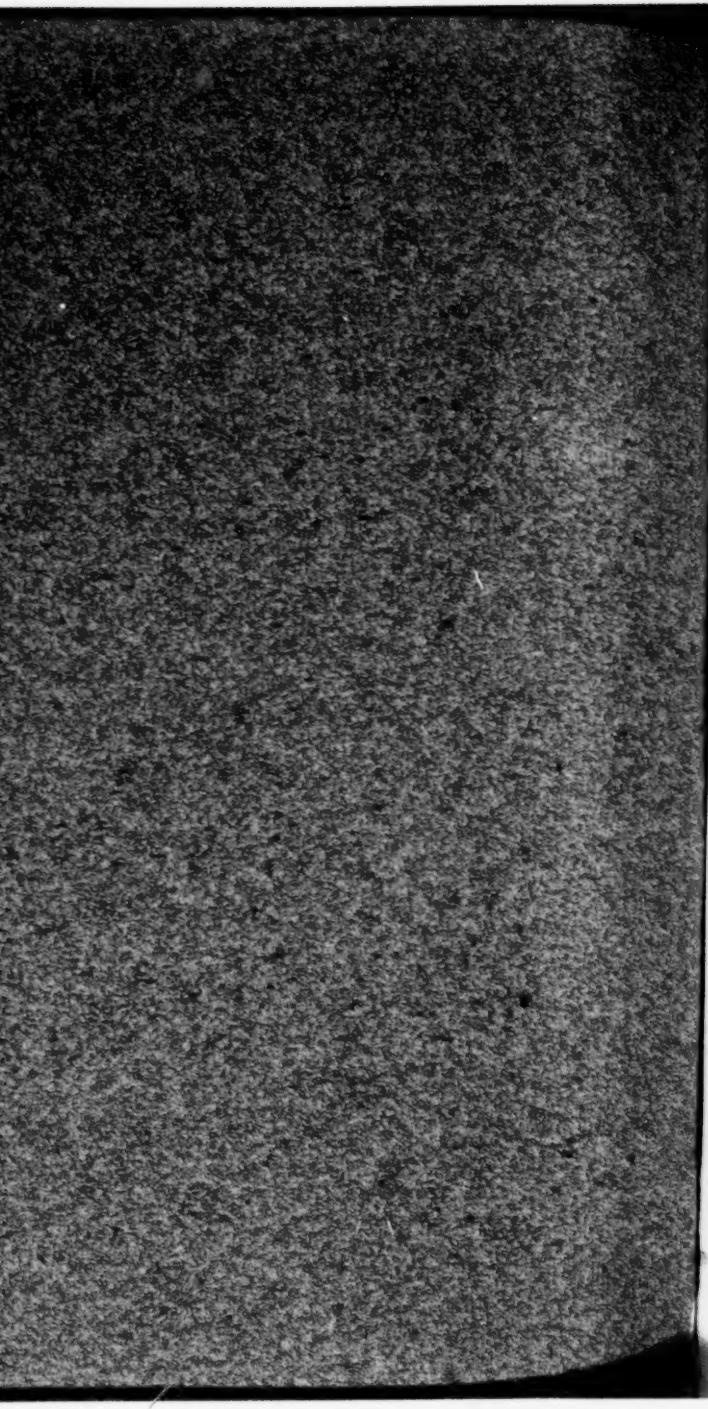
OCTOBER TERM.

THE CITY OF DETROIT, et al.
Defendants and Appellants,
vs.
THE DETROIT CITIZENS' STREET RAILWAY COMPANY.

No. 182.

# Petition and Brief for Rehearing.

TIMOTHY E. TARSNEY,
Solicitor and of Counsel for Petitioners and Appellants.



SU

THE
WIL
CHA

THE

Ha
Cou
to c
be p
grou
1.
Stat
fare.
2.
visio
the p
3.
heret

No. 152

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

THE CITY OF DETROIT,
WILLIAM C. MAYBURY, Mayor,
CHARLES FLOWERS, Corporation Counsel,
*Appellants.*

Vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
*Appellee.*

## PETITION FOR RE-HEARING.

Having carefully examined the opinion of this honorable Court, I think that with propriety I may ask the Court to consider whether this case be not one in which it will be proper to grant a re-hearing to the appellants on the grounds that:

1. It nullifies a provision of the Constitution of the State of Michigan intended to safeguard the public welfare.

2. It overrides and holds for naught a legislative provision in the Charter of the City of Detroit designed for the protection of the inhabitants thereof.

3. It is a radical departure from the principles of law heretofore frequently announced by this Court.

## I.

I endeavored to point out in my original brief, pages 86 to 111, that under the Constitution of the State of Michigan it was not within the power of the Legislature to enact irrepealable laws nor to confer upon municipalities the like power. Section 1 of Article 15 of the Constitution of Michigan reads:

> "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

The learned writer of the opinion on page 11 says:

> "In Pingree vs. Michigan Central Railroad Company, (118 Mich. 314) decided in 1898, the Supreme Court of Michigan held that Section 15 of the laws of 1846, relating to the incorporation of the Michigan Central Railroad Company and other sections mentioned in the Act, which provided that the company might fix, regulate and receive tolls taken for the transportation of passengers or property on the railroad subject only to the limitation, as to passengers, of three cents per mile, etc., the company having the power to charge for tolls and transportation such sums as might be lawfully established by the by-laws of the company, and the board of directors having power to pass all by-laws necessary for carrying into execution all powers vested in the company, conferred a contract right on the corporation to fix tolls within the limits of three cents per mile, which right could not be violated by the acts of a succeeding legislature."

The writer hereof was not unmindful of the fact that it had frequently been held that unless prohibited by constitutional provisions, the State had the authority to enter into contracts binding and irrevocable in their character,

and it is the distinction between that class of cases and the one we are considering I have endeavored to point out. The Michigan Central Charter and contract was approved March 28, 1846. Previous to that time the State had engaged extensively in works of internal improvement. It had commenced the construction of three lines of railroad across the State, including the Michigan Central. It had engaged in the construction of canals. These works were carried on to that extent that it threatened the bankruptcy of the State. The public became alarmed and demanded that such work at State expense must stop. The Legislature had property to sell. It sold the Michigan Central railroad for $2,000,000. It entered into a contract in which it declared that:

> "The State reserves the right at any time after for 30 years from the passage of this act, by a vote of two-thirds of each branch of the Legislature, to alter, amend or repeal the same; Provided, that said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment or repeal."

> "The rights and franchises vested or which may be vested in the company under or by virtue of said Act shall not any in manner be prejudiced or affected save as herein provided or by judicial proceedings or by a re-purchase of said railroad to be made by the State as in said section (36) provided."

*The Constitution of Michigan then in force contained no limitation upon the power of the Legislature except as was contained in the "bill of rights,"* none of which affected its power to pass irrepealable laws. And while it is true as stated by the learned Judge that Pingree vs. the Michigan Central was not decided until 1898, yet the question involved was that of a contract made between the State and the company in 1846. The present Constitution of Michigan was framed in 1850. Prior to the framing of this Constitution, the Legislature under its unrestrained power, had by special act, incorporated numerous plank road companies, the life of which was generally 60 years, and all containing a provision that they should not be

subject to alteration, amendment or repeal for 30 years. At the session in 1848 49 such companies were chartered. Indeed, it would appear that nearly every public highway in the State had been surrendered to such corporations. The checking of such legislation was imperatively demanded for the safety of the State, and having this end in view, the constitutional convention adopted Section 1 of Article 15, above quoted, provided that all laws in relation to corporations should be subject to alteration, amendment or repeal. It is manifest then that while the Charter of the Michigan Central Railroad Company was properly sustained as a contract under the Constitution of 1835, it could not be sustained as a contract if made since the adoption of the Constitution of 1850, and the premises of the learned Justice fall to the ground. Surely if the Legislature of the State under this constitutional provision could not enact an irrepealable law, it is inconceivable how the Legislature possesses the power to confer upon a municipality authority which the Legislature itself does not possess. I quote again:

> "All laws passed pursuant to this section may be amended, altered or repealed."

If the Legislature in 1862 had assumed to fix the rates of fare upon the Detroit City Railway, such act would have been a law within the meaning of this constitutional provision. Instead of doing so, in pursuance of Section 38, Article 4, which provides that:

> "The Legislature may confer upon organized townships, incorporated cities, villages and upon the board of supervisors of the several counties such powers of a local, legislative and administrative character as they may deem proper." It conferred the authority to fix the fares upon street railways upon the city of Detroit, and though the instrument in which those rates are fixed is denominated an "ordinance" it is nevertheless a "law" within the meaning of both the State and the Federal Constitution, and it is a law, too, enacted by the State, through its delegated authority. This Court only

acquires jurisdiction of this case because this ordinance is a law within the meaning of Section 10, Article 1, of the Constitution which declares that, "No State shall ..... pass any ..... law impairing the obligation of contracts." It was upon this ground that this Court sustained jurisdiction in Hamilton Gas Light and Coke Co. vs. City of Hamilton, 146 U. S. 258. It is there said:

> "We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question and to maintain and erect gas works of its own upon that section of the municipal code of Ohio, providing that the city council of any city or village should have power, whenever it was deemed expedient and for the public good, to erect gas works at the expense of the corporation or to purchase gas works already erected therein, which section the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the State and the City."

In Capital City Gas Co. vs. DesMoines, 32 Fed., 824, it was likewise held that a municipal ordinance fixing gas rates is law of State. In Citizens' Railway Company vs. City Railway, 56 Fed. 751, it was held, the exercise by council of power granted by Legislature to grant street car franchises, when done by ordinance is "law" of state.

The ordinances then being laws passed pursuant to State authority must necessarily be subject to the provision of Section 1, of Article 15, of the Michigan Constitution and subject to alteration, amendment or repeal. *Therefore the railway companies accepting the ordinances must be held to have done so subject to the reserve power to alter, amend or repeal.* This has been so repeatedly and uniformly held in the cases cited by me in my original brief, 86-111, and in the Hamilton Gas Light case, supra. Approved in People vs. Cook, 148 U. S., 411, upholding tax

on corporations organized under statute to purchase foreclosed railroads, and in United States vs. Union Pacific Railway, 160 U. S., 37, where this Court held that the reservation to alter or amend railroad charters was not affected by subsequent contracts made by corporations. City Railway Company vs. Citizens' Street Railway Co., 166 U. S., 557-563, cited on page 21 of the opinion affords no support for the contention made here. *There is no provision in the Constitution of the State of Indiana that all laws relative to corporations are subject to alteration, amendment or repeal. In that case the right was reserved to the General Assembly itself in the legislative act to amend or repeal at its discretion*, and this Court very properly held in that case that that was a right reserved to the General Assembly itself and was not delegated to the Common Council of the City. In the case we are considering, legislative power has constitutionally been conferred upon the city. The city enacts its laws called ordinances and it has the power to revise, alter or amend such ordinances. It would seem to necessarily follow that it is only the body that exercises the legislative power that has the power to alter or amend unless such power of alteration or amendment is expressly reserved to some other body. Equally unfortunate is the citation of the recent case of Detroit Citizens' Street Railway Company vs. The Common Council of the City of Detroit, 125 Mich., 673. No attempt had been made in that case to alter or amend the ordinance under consideration. The question of power to enact such an ordinance was the only question presented. Had the City attempted in that case to amend that ordinance, the question here might have been presented. Such ordinances may, perhaps with propriety be regarded as created contractual relations to continue until such time as the constitutional right of alteration, or amendment is exercised. This I infer was the meaning of this Court in New York and New England R. R. Co. vs. Bristol, 151 U. S., 556, where it is said:

> "The governmental power of self protection cannot be contracted away."

And again in Wabash Railroad Co. vs. Defiance, 167 U. S., 88, this Court said:

> "Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the Common Coun-

cil can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants."

And the rule is more clearly stated by this Court in C., B. & Q. R. R. Co. vs. Neb., 170 U. S., 57:

> "Where a contract not contrary to public policy has been entered into between parties competent to contract it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern but are persons and corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot by making agreements on subjects involving the rights of the public withdraw such subjects from the police power of the Legislature."

Or as tersely stated by Judge Severns in Michigan Telephone Company vs. The City of Charlotte, 93 Federal, 11:

> "But here again assuming that the contract exists, it is well settled that with respect to contracts of this character they are subject to such incidental modification as results from legislation required in the public interest. It is a fundamental proposition that the Legislature cannot deprive itself by contract of the power to pass such laws as are necessary for the general welfare of the public."

As a result of the reckless legislation in the years just preceding the adoption of the present Constitution of Michigan, before referred to, it was declared in Section 9, of Article 14, of the Constitution of 1850, that:

> "The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work except in the expenditure of grants to the State of land or other property."

In 1899 the Legislature of Michigan attempted to confer upon the City of Detroit the power to purchase the street railway system. In Attorney General vs. Pingree, 120 Mich., 550, the Court held the act of the Legislature referred to as in violation of the above Constitutional Provision prohibiting the State from engaging in works of internal improvement and in answer to the contention that it was a limitation upon the power of the State and not the municipality the Court said at page 570:

> "If the Legislature may authorize the City of Detroit to enter into the proposed arrangement, it may authorize any other municipality to do so, and, by concert of action between the various municipalities, they may cover the State with means of rapid transit, owned and operated by the municipalities. This would enable the State to do, by means of agencies called into being by itself, what it cannot itself do, and what the Constitution forbids its doing."

If the State can confer upon municipalities the power to pass legislation not subject to alteration or amendment, then in the language of the Court in the above case, this would enable the State to do by means of agencies called into being by itself what it cannot do itself and what the Constitution forbids its doing. This is in keeping with the opinion of Mr. Justice Jackson in Grand Rapids E. L. & P. Co. vs. Grand Rapids E. E. L. & F. G. Co., 33 Fed., 659. Where in discussing the same constitutional provision invoked here, he said:

"Looking at the question of legislative intent, from another standpoint, we find that it is not the policy of the State of Michigan to grant irrepealable franchises and privileges to private corporations. Article 15, Section 1, of the State Constitution, provides that, 'Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed.' Now, by the ordinance of 1880, if valid, the complainant, a corporation organized under the laws of the State, has secured not only the exclusive franchise belonging to the State, but an irrepealable privilege, such as the Legislature could not have conferred. It is to be presumed that the Legislature under ints constitutional authority 'to confer upon incorporated cities such powers of a local, legislative and administrative character as they may deem proper,' intended to invest the Common Council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city, and thereby confer upon the grantee privileges or franchinses not subject to alteration, amendment or repeal—rights which the Legislature could not itself have directly conferred. If such a presumption is proper, the conclusion is reached, that the agencies or creatures of the State may in the exercise of derivative and delegated power do what the Legislature could not. This would violate the well-settled rule, that the Legislature cannot do indirectly through the local government what the people by their Constitution have restricted it in doing directly." Dillon Mun. Corp., 2d Ed., Sec. 262.

I repeat, the effect of the recent opinion of this Court in this case is to nullify Section 1, Article 15, of the Constitution of Michigan of 1850.

## II.

Mr. Justice Peckam entirely misapprehends my contention in relation to the ordinances of November 14, 1879, and June 30, 1880, and December 3, 1885. At page 19 of the opinion wherein he states that the objection being that the extending of the term of the consents beyond the time

limit of the corporate life of the companies was illegal and void. No such contention was made by me either in the briefs or the oral argument. My contention was and is that such extension ordinances were void because they violated the express terms of a legislative enactment contained in the Charter of the City of Detroit which is quoted in the last pages of my original brief, being Section 19 of Chapter 7:

> "Section 19. The style of all ordinances shall be: 'it is hereby ordained by the people of the City of Detroit,' No ordinance shall be revised, altered or amended by reference to its title only, but the section or sections of the ordinance altered or amended shall be re-enacted and published at length."

The Detroit City Railway ordinance was limited to 30 years from and after the date of its passage. (Record, p. 30.) The same is true of the Fort Wayne and Elmwood ordinance, adopted January 31, 1865. Sec. 20, p. 73, Record. Likewise, the Grand River Street Railway ordinance, adopted May 1, 1868, Sec. 19. Record, p. 56. In the ordinance adopted November 24, 1879, (Record, p. 35) entitled:

> "An ordinance supplementary to an ordinance, entitled: 'An ordinance permitting certain persons to establish and locate railways in the City of Detroit,' approved November 24, 1862, and amendments thereto and for other purposes." Section 5 contains the following provision:

> "Section 5. The powers and privileges conferred and obligations imposed on the Detroit City Railway by the ordinance passed November 24, 1862, and the amendments thereto, are hereby extended and limited to 30 years from date."

In identically the same language the Fort Wayne and Elmwood ordinance was extended in the supplementary ordinance of June 30, 1880, and the Grand River Street Railway ordinance by a like ordinance approved December 3, 1885. Record, p. 58. My contention was and is that

this language is an alteration and amendment of the original ordinances, and that the method pursued violates that provision of the Charter, the legislative rule laid down in Section 19, that:

> "No ordinance shall be revised, altered or amended by reference to its title only, but the section or sections of the ordinance altered or amended shall be re-enacted and published at length."

This contention is entirely ignored in the opinion. Justice to myself and to the Court impels me to call attention to it. Section 25 of Article 4, of the Constitution of Michigan contains the same provision substantially. This contention is again referred to at page 23 of my reply brief. The reason of the adoption of the constitutional and statutory provision requiring re-enactment and re-publication is plainly stated in People vs. Mahaney, 13 Mich., at page 497. Mr. Justice Cooley, speaking for the Court, said:

> "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phase for another in an act or section which was only referred to but not re-published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

This language was reiterated in Mok vs. Detroit B. & S. Association, 30 Mich., 511, where Judge Cooley said at page 529:

> "What has been attempted here is, to duplicate an act, but at the same time to accommodate it by indirect amendments to a new class of cases, is disregard of the constitutional provision which re-

> quires *each act of legislation to be complete in itself*, and forbids the enactment of fragments which are incapable of having effect or of being understood until fitted into other acts, after by construction or otherwise, places have been made for them. No such legislation can be sustained."

Again in Burton vs. Schildbach, 45 Mich., 504, at page 508, Judge Cooley said:

> "*The defect in the act was found to be that it was not complete and sufficient* in itself to permit of incorporations under it, and that it undertook to accomplish the purpose by reference to an indirect and blind amendment of a previous statute, whereas the Constitution requires that all amendments of *statutes shall present the provisions in full as amended*."

Standing alone and by themselves the so-called extension ordinances are meaningless. It is only by reference to the previous ordinances that we can ascertain what was referred to. They undertake to carry forward for a period of 30 years the entire provisions of the previous ordinances without re-enactment and without re-publication. The extension ordinances are not complete in themselves and hence, in the language of Judge Cooley, "No such legislation can be sustained." They violate the express language of the legislative provision contained in the Charter of the City of Detroit, "that no ordinance shall be revised, altered or amended by reference to its title only, but the section or sections amended shall be re-enacted and re-published at length."

How then can these extension ordinances be sustained as valid enactments operating as they do as an indirect amendment and alteration of the terms by changing the limit of their duration without violating the statutory provision quoted

So I repeat, the opinion nullifies the legislative act intended to prevent improvident legislation of this character.

The extension ordinance of November 14, 1879, was questioned in Detroit Citizens' Street Railway Company vs. Detroit, 64 Fed., 628. The question there mooted was the power of the Common Council in 1879 to grant a franchise extending beyond the life time of the corporation to which it was granted. That question is not involved here. The Grand River Street Railway and the Fort Wayne &

Elmwood extension ordinances were not involved in that litigation. They had not expired at the time such litigation was begun. The point I make in this case concerning the validity of these ordinances was not raised in the case in 64th Federal, though it might have been, and whatever effect the decision in that case may have been to the Detroit City Railway ordinance of 1879, it cannot affect the Fort Wayne & Elmwood and the Grand River Street Railway ordinances because they were not involved in the controversy.

This Court in Cromwell vs. Sac County, 94 U. S., 351, at page 353, held that, "where a second action between same parties is upon a different demand, that a prior judgment operates as an estoppel only as to matters in issue or points controverted upon, which such demand was based." Mr. Justice Field said:

> "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matter arising in a suit upon different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

And Judge Taft, in City of Detroit vs. Detroit Railway, 56 Fed., 893, in passing upon the validity of the Detroit Railway extension, held that the city was not concluded by a judgment sustaining that part of the ordinance fixing tax rate for the extended period. If the doctrine of estoppel is to be applied at all, it can only extend to the Detroit City Railway ordinance and cannot affect the Fort Wayne & Elmwood or the Grand River ordinance, because it was only the Detroit City Railway ordinance that was litigated in the former controversy, hence, the rule followed by this Court in Chance Mining Company vs. Tyler Mining Company, 157 U. S., 687, holding decree as to priority of location on part of mining claim not conclusive as to the rest. Mr. Justice Brewer said: "The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dis-

pute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided."

To the contention that the city should be held estopped because the railway company in apparent reliance upon the validity of these extension ordinances has expended large sums of money, I readily grant that at first blush such claim appeals strongly to the conscience, and if we were dealing with an arrangement between private parties, each acting in relation to their own interests, or if the investment had been made for the benefit of the city, I would readily concede the force of the contention, but we are dealing here with a question of power.

As was said by Judge Taft in City of Detroit vs. Detroit City Railway, 58 Fed., 893:

> "The investments of the street railway company were not given to the city. They were investments of private funds in private property, for private purposes, to subserve the public interest, on the faith of the supposed permanence of the investment. Those who made the investment knew, or ought to have known, the statutory powers under which the city council acted, and if I am right in the conclusion already stated with reference to those powers, ought, in the necessary theory of the law, to have known that they were investing on the faith of a grant which would last only to May 9, 1893. Where full knowledge of the powers of a corporation are had by the person dealing with it, he cannot plead estoppel by reason of a mistake of law, to avoid the claim of ultra vires. This is especially true in cases where the corporation is a municipal corporation and is exercising powers in trust for the public. Rens vs. City of Grand Rapids, 73 Mich., 237; Bogart vs. Lamotte Township, 79 Mich., 294; Spitzer vs. Village of Blanchard, 82 Mich., 234."

And this Court in Hamilton Gas, Light and Coke Co. vs. City of Hamilton, 146 U. S., 258, in answer to the same contention there made, said:

> "It may be that the stockholdres of the plaintiff supposed at the time it became incorporated and when they made their original investment that the city would never do what evidently it contemplated by the ordinance of 1889. . . . It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and National legislation."

I respectfully submit that it should be decreed that the City of Detroit possesses the power to pass the amendatory ordinances.

## III.

The learned writer of the opinion after assuming from fallacious premises that the Legislature had power to authorize the making of an irrevocable ordinance by the city, asserts on page 12 that these agreements had express legislative authority, not only under the tram railway act, but also and particularly under the street railway act of 1867.

By the twentieth section of the latter act it was provided that "the rates of toll or fare, which any street railway may charge for the transportation of persons or passengers over its road, should be established by agreement between the company and the corporate authorities of the city or village where the road is located, and should not be increased without the consent of such authorities," and asserts that the tram railway corporations were brought within the provisions of the street railway act perforce of Section 29 of said last named act. By placing a construction upon the language employed in the twentieth section of the street railway act, that the rates of fare should be established by agreement and that that language was sufficient to imply an agreement not only as to the rate of fare at the time the rates were established, but during all such time as the city and railway authorities might agree that the rate thus established should remain, it strikes me is a radical departure from the principles that have many times heretofore been ennunciated on this subject by this Court. In the Railroad Commission case, 116 U. S., 307, Chief Justice Waite said in speaking of the power of regulation of rates:

> "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank vs. Billings, 4 Pet., 514, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been applied and considered are numerous.

Again, this Court in Detroit Citizens' Street Railway Company vs. Detroit Railway, 171 U. S., 48, in speaking of the ordinance of November 24, 1862, the same ordinance involved in the case at bar, said:

> "It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the Constitution, which, if they do not confer a power independent of the Legislature, strongly provide for and intend local government. The argument is strong and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust —even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in:

Minturn vs. Larue, 64 U. S., 23 How., 436 (16:575).

Wright vs. Nagle, 101 U. S., 791, (25:921).

State (Atty. Gen.) vs. Cincinnati Gas, Light and Coke Co., 18 Ohio St., 262.

Parkhurst vs. City of Salem, (Parkhurst vs. Capital City R. Co., 23 Or., 471; 32 Pac. 304.

Saginaw Gas Light Co. vs. Saginaw, 28 Fed., 529, decided by Mr. Justice Brown of this Court.

Long vs. Duluth, (49 Minn., 280), 51 N. W., 913.

See also:

Grand Rapids Elec. Light & Power Co. vs. Grand Rapids Edison E. L. & Fuel Gas Co., 33 Fed., 659, opinion delivered by Mr. Justice Jackson, at Circuit.

As bearing on the rule, see also:

Oregon Railway & Nav. Co. vs. Oregonian Railway Co., 130 U. S., 1, (32:827).

Central Trans. Co. vs. Pullman's Palace Car Co., 139 U. S., 24, (35:55).

The power therefore must be granted in express words or necessarily be implied. What does the latter mean?

Mr. Justice Jackson, in Grand Rapids Electric Light & Power Co. vs. Grand Rapids, Edison E. L. & Fuel Co., supra, says:

> "That municipal corporations ..... possess and can exercise only such powers as are 'granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred or those essentials to the declared objects and purposes of the corporation, not simply convenient,

> but indispensable.'" The italics are his. This would make "necessarily implied" mean "inevitably implied." The Court of Appeals of the Sixth Circuit by Circuit Judge Lurton, adopts Lord Harwicke's explanation, quoted by Lord Eldon in Wilkinson vs. Adam, 1 Ves. & B. 466 that a "necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator (the party using the language) cannot be supposed." If this be more than expressing by circumlocution an inevtiable necessity, we need not stop to remark; or if it means less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the Common Council of Detroit the power it attempted to exercise in the ordinance of 1862."

Does the language of Section 20 that the rates of fare shall be established by agreement inevitably imply that the rates once established shall remain for 30 years or 100 years, or does it mean that the rates in the first instance shall be established by agreement and that thereafter that they may be altered as the changing conditions and the public welfare may from time to time demand, except that such rates could not be increased without the consent of the municipal authorities?

Does not the language of this Court in the case in 171 U. S., 48, just quoted apply with equal force here?

> "There are many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time and the functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges, (irrevocable privileges.)"

Tested by Lord Harwicke's rule, the rule of this Court as enunciated in the above case, the recent opinion in this case cannot be sustained.

What is to be said of the opinions of this Court in the recent Illinois Water Works cases? In Freeport Water Company vs. City of Freeport, 21 Sup. Ct. Rep., 493, the title of the act under which the ordinances in question were passed was:

> "An act to enable cities and village to *contract* for a supply of water for public use, and to levy and collect the tax to pay for water so supplied."
>
> "Sec. 1. That in all cities and villages where water works may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages *may contract* with such incorporated company for the supply of water for public use, for a period not exceeding thirty years." The authorities of Freeport adopted an ordinance thereunder. Section 2, after providing for the use of streets, etc., recites that: "All the rights and liabilities provided for in this ordinance shall continue for a period of thirty years unless sooner extinguished by purchase." Section 7 provided for the payment of a fixed sum as annual rental for hydrants . . . "and shall continue for the full term specified in this ordinance, unless the said city shall sooner become the owner of said water works."
>
> Section 13 declared that the ordinance shall become binding as a contract upon the written acceptance thereof by the grantee . . . and this ordinance, when so accepted, shall not be altered, amended or changed in any way without the concurrence or consent of both parties thereto and interested therein or their successors or assigns."

The authorities within the period limited amended such ordinance and fixed lower rates. The power to do so was questioned. The majority of this Court said:

"The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public, the Court applied the rule declared in many cases," and adopted the language of Chief Justice Waite in the Railroad Commission cases above quoted.

Your Honor said the question is whether the power given to the municipalities of the State shall be continuing or occasional, indeed only special in its purpose, intended to

have but one exercise, and then bound in contract for thirty years. *If the latter had been the intention it would have been natural to express it.*" Apply this language to Section 20 of the Street Railway Act of 1867. The language there is, "the rates of fare shall be established by agreement." In the Illinois statute the city or village authorities may contract. Do your Honors now think there is a narrower or different signification to the word "agreement" *than was then attached* to the word "contract?" The Illinois statute contained the words, "may contract for a period not exceeding thirty years." The Michigan statute, "shall establish by agreement," but no reference whatever is made to the time such agreement should continue. M ay I not quote from your honor's language in that case again and say, "*that if it had been the legislative intent to contract for thirty years or any other period of time, it would have been natural to express it.*" Your honors in the Freeport case said further: "There is no explicit provision for repetitions of the power,—none declaring the power conferred a continuing one. Who now doubts that it is?"

In the Tram Railway Act under which these companies were organized and under which these ordinances were granted, they were to be subject to such regulations as the municipal authorities might "from time to time prescribe." In section 20 of the Street Railway Act they shall simply be established "by agreement." Permit me to quote your Honor's language again as applicable to this case: "There are no explicit provisions for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is?" Your conclusion in that case was that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. Cannot section 20 of the Street Railway Act without straining be construed as distributive? In Illinois the City Council was authorized to contract with any person or corporation to construct and maintain water works "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." Your Honors said: "The words, 'fixed by ordinance,' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is the most favorable to the public, not that one which would so tie the hands of the council, that the rates could not be adjusted as justice to both parties might require at a particular time."

"Fixed by ordinance," or "established by agreement," do they not both mean the same thing? Is one interpretation to be applied to the Illinois law and another to the Michigan law? One interpretation to water works and another to street railways? Surely less ambiguity exists in the Michigan statute than in the Illinois statute. If there is no express authority to contract for any period of time, may we not well then ask this Court to apply the rule followed in that case, that, "of the two constructions that must be adopted, which is the most favorable to the public, not that one which would tie the hands of the council, that the rates could not be adjusted as justice to both parties might require at a particlar time."

I am content to be governed by the rule laid down by the minority of this Court in the dissenting opinion of Mr. Justice White. He said:

> "It is unquestioned also that where a right asserted, if enforced will put a contractual limitation upon the power of the law-making authority of the State, presumably to be exercised for the public benefit, the doubt is to be resolved in favor of the continued existence of the law-making power. In other words, that no contract limitation on the powers of government can be upheld by mere implication, or sustained if there be doubt on the subject. The existence of such a contract relation must arise clearly and by express intendment."

Again in Rogers Park vs. Fergus, 21 Sup. Ct. Rep., 490, Mr. Justice Waite said:

> "Of course it is conceded under the rule of construction set by me in my dissent in the Freeport case, that if doubt arose from an analysis of the provisions of the contract, that doubt must be solved against the water company in favor of the municipality."

If the opinion handed down in this case on the 4th inst. is to be adhered to, is the bar of the country to understand that this Court has abandoned the principles herein recited and which have guided it in its deliberations for nearly a century? Are we to understand that in States like Michigan where we have planted an anchor of safety

in our fundamental law and carefully limited the powers of legislation and prohibited the enactment of irrepealable or unalterable legislation, that such provisions are to be nullified and swept aside and held for naught whenever a subservient Legislature or obedient council may be induced to enter into contracts to barter away legislative functions? Are we to be told that a legislative act intended as a guide and protection counts for nothing and that our common council may alter, and amend ordinances by mere reference and without re-enactment or re-publication? Are we to understand hereafter that whenever doubts arise concerning the construction of an ordinance or a statute that such doubts are to be construed against the public instead of in its favor?

On the last page of the opinion I find language that is equally incomprehensible. The opinion says:

> "It cannot be supposed for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the company."

This Court has so often held that the State may regulate rates and fares that we had supposed this contention practically settled.

Nothing decided since Mun vs. Illinois, 94 U. S., 113, has tended to weaken the conclusion therein announced as to the classes of property which may be deemed affected by a public use nor as to the authority of the public to regulate such use by preventing unjust discrimination, nor by prescribing maximum rates of charges which may be collected for services rendered by persons or property employed in such use.

In Smythe vs. Aimes, 169 U. S., 521, this Court said, it cannot be doubted that the making of rates for transportation by railroad corporation along a public highway between points wholly within the limits of the State is a subject primarily within the control of State, and it ought not to be supposed that Congress intended that so long as it forebore to establish rates that the Union Pacific railroad, the corporation itself, could fix such rates for transportation as it saw proper, independently of the

rights of the States through which the road was constructed to provide regulation for transportation beginning and ending within their respective limits. It was always the law that the rates of charges should be reasonable, now if the authorities may by proper means fix rates, its action is presumed to be just.

This Court held in Regan vs. Farmers, Etc., Co., 154 U. S., 362, that the Railroad Commissioners' schedule of rates is at least prima facie evidence of what is reasonable. This was approved in Santiago Land Co. vs. National City, 174 U. S., 754, where your Honors held that the judiciary should not interfere unless rates are so palpably unreasonable as to render enforcement deprivation of property. But the rates when fixed by legislative action have been considered as dependent for their validity upon their reasonableness and this has been the controlling inquiry.

St. Louis Etc. R. R. Co. vs. Gill, 156 U. S., 649.

Covington, Etc. Co. vs. Sanford, 164 U. S., 578.

Smythe vs. Aimes, 169 U. S., 466.

What room is there then for the fear expressed in the opinion that the rates fixed by the common council might be fatal to the pecuniary success of the company? How can the pecuniary success of the company be imperiled by fixing a reasonable rate? We understand that the right to fix rates is subject to this limitation. That we must give the railway company a reasonable return upon its investment. And in this case your Honor's attention is called to the fact that the railway company do not attack the validity of this ordinance because the rate fixed is unreasonable. This Court has unfortunately raised a question which the railway company dared not raise. It has limited itself to questioning the power to fix any rate. Under the decisions of this Court the rates fixed by this ordinance are reasonable and hence cannot be fatal to the pecuniary success of the company.

Wherefore, upon the foregoing grounds these complainants and petitioners respectfully pray this honorable Court to grant to it a re-hearing of said cause.

TIMOTHY E. TARSNEY,
Attorney for Petitioners and Appellants.

I, Timothy E. Tarsney, of counsel for the appellants and petitioners do hereby certify that in my judgment, the foregoing petition for a re-hearing is well founded and that the same is not interposed for delay.

TIMOTHY E. TARSNEY,
Attorney for Petitioners and Appellant.